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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 574

THE STATE OF ALABAMA AND PUBLIC SERVICE COMMISSION, THE STATE OF TENNESSEE AND THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, COMMONWEALTH OF KENTUCKY AND RAILROAD COMMISSION OF KENTUCKY, *Appellants*

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR BY CHESTER BOWLES, PRICE ADMINISTRATOR, ET AL. *Appellees.*

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF AND ARGUMENT OF APPELLANTS, STATE OF ALABAMA AND PUBLIC SERVICE COMMISSION.

WILLIAM N. MCQUEEN,
Acting Attorney General.
FORMAN SMITH,
Assistant Attorney General
On The Brief.

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JURISDICTION

The jurisdiction of this Court is envoked under Section 210 of the Judicial Code, U. S. C. A., Title 28, Section 47 (a).

The order of the District Court for the Western District of Kentucky was entered on August 3, 1944.

The petition for appeal was duly presented to the District Judge and an order was signed allowing the appeal on September 29, 1944. Jurisdiction was noted by this Court on November 13, 1944.

REFERENCE TO OFFICIAL REPORTS

The report of the Interstate Commerce Commission in Alabama Intrastate Passenger Fares and related cases is reported at 258 I. C. C. 133.

The opinion of the District Court for the Western District of Kentucky, entitled State of Alabama, et al v. United States, et al, State of Tennessee, et al v. United States, et al, Commonwealth of Kentucky, et al v. United States, et al, is reported in 56 Fed. Supp. 478.

QUESTIONS PRESENTED

1. The questions presented by Appellants are whether the order and decision of the Interstate Commerce Commission constituted an unlawful disregard of Section 13 (4) of the Interstate Commerce Act and the stabilization legislation by disregarding wartime conditions, and acting instead upon peacetime considerations in annulling the order of the State Commissions which declined to authorize intrastate passenger fare increases not presently necessary.

2. Whether the Interstate Commerce Commission, under Section 13 (4) of the Interstate Commerce Act, has authority to order the increase of an existing profitable intrastate passenger fare where there is no sufficient evidence of discrimination against persons or localities.

3. Whether an increased interstate fare authorized without a hearing by the Interstate Commerce Commission conforms to the high standard of certainty necessary to give an order of a subordinate agency, such as the Interstate Commerce Commission, precedence over a State rate.

STATUTES INVOLVED

The following statutory provisions are printed in Appendix A to this brief:

1. Section 13 (4) of the Interstate Commerce Act, U. S. C. A., Title 49.

2. Section 15a of the Interstate Commerce Act, paragraphs (2), (3), and (4), U. S. C. A., Title 49.

In effect at the time of the decis .n of the cases of Railroad Comm. v. Chicago B. & Q. R. Co. and New York v. United States, hereinafter cited.

3. Section 15 of the Interstate Commerce Act, U. S. C. A., Title 49.

4. Section 15a of the Interstate Commerce Act, U. S. C. A., Title 49. Now in effect.

HISTORY OF THESE PROCEEDINGS

The proceedings involved in this appeal began after the Southern Passenger Association filed a petition with the Interstate Commerce Commission on July 14, 1942, seeking permission on behalf of the Southern railroads to increase interstate passenger coach fares from the general basis of 1.65 to 2.2 cents per mile. By order of August 1, 1942, under the proceeding in Ex Parte 148, Increased Railway Rates, Fares and Charges, 1942, and without a hearing, the Commission authorized these railroads to apply a 10 per cent increase to fares on the basis of 2 cents per mile, which in 1936, upon evidence compiled and submitted in 1935, had been established as a maximum reasonable fare in Passenger Fares and Surcharges, 214 I. C. C. 174. The railroads involved in this proceeding then filed tariffs, effective October 1, 1942, making this increase in interstate fares. By procedures in compliance with state laws, the railroads sought a like increase in intrastate fares in many states, including Alabama, Tennessee, Kentucky and North Carolina.

After due hearing the Alabama Public Service Commission, and regulatory bodies of Tennessee, Kentucky and North Carolina denied the increase on the ground that the carriers had failed to show that

the increase sought was just and reasonable. Shortly thereafter, the Alabama Public Service Commission and the North Carolina Commission filed separate petitions with the Interstate Commerce Commission seeking an investigation into the reasonableness of the interstate level of fares. These petitions were denied by the Interstate Commerce Commission without a formal hearing or report.

Following denial of the increases sought in intrastate fares, the principal railroads by separate petitions for each of the named states invoked the jurisdiction of the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act. The Commission instituted four separate investigations and conducted four separate hearings, the Price Administrator appearing in each of the hearings. The four proceedings were argued together before the Commission and decided in one report entitled Alabama Intrastate Fares, 258 I. C. C. 133. Application for rehearing was duly made and denied by the Commission. Thereafter, the Commission entered its order commanding the involved railroads to increase their intrastate fares to the level of the interstate fares.

In the Thirteenth Section investigation, the Commission found (1) that the interstate fares on the basis of 2.2 cents per mile are just and reasonable; (2) that the intrastate fares in Alabama, Kentucky, North Carolina and Tennessee were lower than the interstate fares (3) that passenger trans-

portation conditions in interstate and intrastate commerce are substantially similar; (4) that such transportation in the same trains and generally in the same cars results in undue and unreasonable advantage and preference of the intrastate passengers, and undue and unreasonable disadvantage or prejudice of interstate passengers; (5) that the lower intrastate fares produce at least $2,275,000.00 per annum less than if the level of interstate fares had been in effect, and traffic moving under the lower intrastate fares "is not contributing its fair share of the revenues required to enable the respondents to render adequate and efficient transportation service," and (6) that the maintenance of the lower intrastate fares resulted in violation of Section 13(4) of the Interstate Commerce Act. The Commission held that unlawfulness should be removed by increasing the intrastate fares to the interstate level.

SPECIFICATION OF ASSIGNED ERROR TO BE URGED.

The District Court of the United States for the Western District of Kentucky erred as a matter of law in concluding that the findings and order of the Interstate Commerce Commission were based on substantial evidence, did not involve errors of law, and were not arbitrary, unreasonable or capricious. In particular, the District Court erred, as a matter of law, in concluding that there was substantial evidence of record to sustain, consistently with the

Commission's duty to give full effect to wartime conditions, and national stabilization legislation, the Commission's finding that an undue, unreasonable and unjust discrimination against interstate commerce, within the meaning of Section 13 (4) of the Interstate Commerce Act, had resulted from the decisions and orders of the involved State Commissions in refusing to permit intrastate fares to be increased to the interstate level.

HISTORY OF SOUTHERN PASSENGER FARES

We have been furnished with a copy of the brief being filed in this cause by Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, which we adopt as our own.

The history of Southern Passenger Fares is comprehensively stated therein, and a repetition here would only burden the Court unnecessarily. We also adopt as our own the briefs being filed by the State of Tennessee and the Commonwealth of Kentucky.

SUMMARY OF ARGUMENT.

The position assumed by the appellants (State of Alabama and Alabama Public Service Commission) is briefly as follows:

1. The method used by the Commission in its attempt to establish the interstate passenger fares as reasonable does not conform to the high standard

of certainty required to permit its order to take precedence over a state made rate or fare.

2. The order of the Commission authorizing the involved railroads to increase their interstate passenger coach fares to the level of 2.2 cents per mile was issued without a hearing and without authority of law, and is, therefore, void, and cannot support the finding that the interstate fare is reasonable.

3. So long as a state made rate or fare produces all revenues necessary to provide adequate and efficient railroad transportation service and, in addition thereto, a reasonable return to the carriers, it is impossible for such a rate to impose a burden on interstate commerce or to create an undue, unreasonable, or unjust discrimination against interstate or foreign commerce within the meaning of Section 13 (4) of the Interstate Commerce Act.

4. Section 15a of the Interstate Commerce Act requires that the Commission consider the national stabilization legislation, and that in this proceeding it failed so to do.

ARGUMENT

It is a matter of general knowledge that during a normal economic era, the railroads in the Southern District suffer a deficit from their passenger operations and that a support factor is incorporated in freight rates to compensate the carriers for this

deficit. This is not only a matter of common knowledge, but is supported by the testimony of the railroad's own witness (R. 713). We do not contend that State-made rates or fares should not be sufficient to contribute their pro rata share of the revenues necessary to enable the carriers to render adequate and efficient transportation service, but we do contend that whenver State rates are sufficiently high that they do contribute their pro rata share of such revenues, they cannot possibly impose any undue, unreasonable or unjust discrimination on interstate or foreign commerce within the meaning of Section 13(4) of the Interstate Commerce Act.

The basic facts involved in this proceeding can be illustrated by a hypothetical situation. Assume that during 1936 a bus operator covered a route averaging only two passengers per mile traveled, his operation costs being twelve cents per mile and his fares being five cents per mile. This operator also hauls a certain amount of express, the rate upon which is designed to compensate for the two cent per mile passenger deficit and also allow an overall operating profit in addition to normal express rates. In 1942 wartime restrictions practically eliminate all competition, his express profits increases more than a thousand percent and, instead of hauling an average of two passengers per bus mile, he now hauls twenty, five of whom are required to stand. His costs of operation have increased to twenty cents per mile.

Has this carrier now, when the public is forced to use his services, a right to increase his passenger fares on an alleged deficit from past passenger operation? There was no deficit; the public paid any loss he might have suffered from passenger operations by the support factor incorporated in the express charges. Such a carrier now clearly has a profit of eighty cents per mile plus the support factor incorporated in express charges and the latter multiplied many times over by increase in express traffic. The principles in the above illustration do not vary from the basic principles involved in the case at bar.

THE COMMISSION'S METHOD OF DETERMINING THE REASONABLENESS OF THE INTERSTATE FARE.

In 1936, upon evidence compiled in 1935, the Commission found that a passenger coach fare in excess of two cents per mile unreasonable and unlawful, but that a minimum fare on the basis of one and one-half cents per mile was not unreasonable or otherwise unlawful. See Passenger Fares and Surcharges, 214 I. C. C. 174. In Jaunary 1942, under Ex Parte 148, 248 I. C. C. 545, the Commission permitted an increase in the passenger fares then in effect of ten percent, refusing to prescribe such increases as reasonable and retaining jurisdiction for the purpose of investigating the reasonableness of any particular fare or rate. On July 14, 1942, an application was filed with the Commission seeking authority to in-

crease the interstate passenger fares from the 1.65 basis to 2.2. This application was filed under Docket No. 26550, the Docket Number of the1936 Passenger Fare case reported at 214 I. C. C. 174, whereupon, without hearing, the Commission dismissed the application and ex mero motu amended its original Ex Parte 148 Order authorizing such an increase. This Order of the Commission is set forth at page 982 of the Record and we invite its perusal. Thereafter the State of Alabama and the State of North Carolina filed applications or petitions with the Commission seeking an investigation into the reasonableness of the interstate fares. The two states' applications or petitions were denied and the Commission refused to institute an investigation.

FALLACIOUSNESS OF THE COMMISSION'S METHOD OF DETERMINING THE REASONABLENESS OF THE INTERSTATE FARES.

The first fallacy is that the Commission takes a fare, established on evidence compiled in 1935, and to this, without inquiry into the 1942 reasonableness of such fare, applies a ten percent increase to such fare in a "finance case." The Commission entirely ignored their finding in the same 1936 case that it also found that a fare based on one and one-half cents per mile was "*not unreasonable or otherwise unlawful.*" Only one time in history has this Court set aside an order of the Commission on the

ground that the record was stale (*Atchison T. & S. F. Ry. v. United States*, 284 U. S. 248). However, there is a great deal of similarity between the Atchison case and the case now before this Court. In the Atchison case the Record was closed on September 22, 1928, and submitted to the Commission on July 1, 1929. The first report of the Commission was made on July 1, 1930, the order of July 1 to go into effect October 1, 1930. In September, 1930, the carriers asked for a rehearing, which was denied in November, 1930. In the application for rehearing the carriers alleged and offered to prove that the order would reduce the gross and net operating revenues in the Western District not less than twenty million dollars annually In the Atchison case this Court held, "That the record pertains to a different economic era and furnishes no adequate criterion of present requirements. While the effects of the widespread economic disturbance have had a progressive manifestation, they had been sufficiently revealed in February, 1931, when the second petition for rehearing was made, to compel the conclusion that the record of 1928 afforded no sufficient basis for the order of the Commission." In the Atchison case three years had elapsed from the time the evidence was compiled until the Commission denied the second application for rehearing. In the Alabama case seven years had elapsed between the time the evidence had been compiled in Passenger Fares and Surcharges, supra, and the time of the hearing in the Thirteenth Section investigation. Approximately the same time had elapsed between the 1936 proceeding and the time Alabama and North Carolina

filed their applications for an investigation into the reasonableness of the interstate fares. True Ex Parte 148 had been held, but in Ex Parte 148 the Commission admitted that in such a proceeding it could not investigate the reasonableness of any particular rate or fare, using the following words:

"A Nation-wide increase, chiefly on a percentage basis, is now proposed. Some important rates average somewhat higher than those effective in 1929, while others are generally lower. Obviously, there can be no detailed ironing out of inequalities in this proceeding" (248 I. C. C., second paragraph, at page 607.)

"In an appropriate order made in this proceeding on January 21, 1942, we found that the increases in fares proposed is necessary to enable the petitioners to *continue* to render adequate and efficient railway-transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares, subject to a suitable rule for the disposition of fractions stated in the order. (Emphasis supplied)

"All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein ap-

proved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942." (248 I. C. C. at page 565.)

"The rates and charges increased as herein permitted are not prescribed rates and charges within the meaning of Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370." (248 I. C. C. at page 613.)

In the Atchison case conditions had changed from an era of prosperity to the beginning of an economic depression between the time the evidence had been submitted and the final order entered. In th Alabama case conditions had changed from an economic depression in 1936, into a "wartime railroad boom" between the time the reasonableness of the 2 cent maximum fare had been established and the time of the Commission's Thirteenth Section order. In the Atchison case there was a difference of one hundred million dollars a year between the 1930 level and the average for the proceeding five years in the railroad's net operating income. In the Alabama case, and as shown by the Commission's report, there was a fifty million dollar difference

in the operating revenues for the twelve railroads operating in Alabama alone. (This difference is computed by averaging the deficits for 1936 through 1941, and adding thereto the 1942 income. R. 13.) And this from passenger operations; in the Atchison case the difference was shown for the Western District; in the Alabama case the difference is shown for one state alone. If such were computed for the entire Southern District, it would obviously exceed the hundred million dollar difference shown in the Atchison case. We, therefore, respectfully submit that, if the record in the Atchison case was too stale to support the Commission's order, the only conclusion that can be reached in the Alabama case, since the evidence is at least as stale, if not more so than the Atchison case, is that the method used by the Commission in attempting to establish the reasonableness of the interstate fares *pertains to a different economic era and furnishes no adequate criterion of present requirements.*

THE EXISTING INTERSTATE COACH PASSENGER FARE IS AN ILLEGAL FARE.

The Passenger Fare and Surcharge proceeding was the first, and so far as we are able to ascertain, the last comprehensive investigation into the matter of the reasonableness of passenger fares. The Commission was petitioned in Ex Parte 148 to permit a ten percent increase in the existing fares. No one, either with the Commission or with those participating in the proceeding, ever considered that the one and one-half cent fares then in effect would be in-

creased to two and two-tenths cents per mile. We believe that the following excerpts from Ex Parte 148 (248 I. C. C. 545) will clearly disclose that the Commission did not in that proceeding consider such an increase. (The numerals following the excerpts indicate the page of 248 I. C. C. from which the quotation is taken.)

> "In petitions filed in December 1941, heard in this proceeding, the carriers by rail subject to our jurisdiction asked us to make certain orders necessary to enable them to increase their rates, fares, and charges in interstate or foreign commerce by ten percent * * *." 549.

> "PETITIONERS' PROPOSALS. Class 1 Railroads.—The first petition was filed December 13, 1941, by substantially all class 1 railroads of the United States and some railroads of other classifications. They requested authority to increase immediately their freight rates and charges and passenger fares in the manner and to the extent therein set forth. The increases sought are generally stated as follows:

> "Passenger: A uniform increase of 10 percent in all fares, including rates and charges for milk and cream and articles grouped therewith as published in passenger tariffs, * * *" 550.

"The petitioners do not regard any issue as to the fair value of the property as necessarily involved. * * * From our study of the record, it does not seem necessary for our determination to enter into a discussion of the value of the common carrier property of the petitioner. The proceeding has not taken on the aspects of a 'fair return' case. As stated by counsel for Class 1 petitioners at the opening of the hearing, this is a revenue case, not a rate case." 555.

"In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway-transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. * * *" 565.

"A Nation-wide increase, chiefly on a percentage basis, is now proposed. Some important rates average somewhat higher than those effective in 1929, while others are generally lower. Obviously there can be no detailed ironing out of inequalities in this proceeding." 607.

"It would be desirable, if feasible, to consider the needs of the railways individually, and to adjust their respective schedules to meet their several needs. The exigencies of the case do not permit such refinement." 609.

"On all passenger traffic in the year ending September 30, 1941, the average was 1.754 cents, the lowest rate per mile in railroad history. The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 *mills in coaches*, and 1.754 mills on all passenger traffic." 564—(Emphasis supplied)

"The increase authorized are upon the present going rates, speaking as of the date of this report, and rates published and filed but not yet effective, but not upon rates held in abeyance by tariffs naming reduced rates with a future expiration date to be revived upon the expiration by limitation of time of the now effective reduced rates. * * * *" 612.

We think, and submit to this Court, that what the petitioners in Ex Parte 148 had in mind, what the Commission had in mind, and what others interested in the proceeding had in mind, was that the passenger fares in existence as of the date of the Commission's order of January 21, 1942, would be increased 10 percent. No other interpretation appears possible. Obviously, the railroads, petitioners in the Thirteenth Section proceeding, also were convinced that the January 21, 1942 order of the Commission only authorized a 10 percent increase in their existing 1.5 cent fares. This is evidenced by the fact that shortly thereafter they placed this fare into effect; that they sought an identical increase

before the various State Commissions, which being granted, a 1.65 intrastate fare resulted for both interstate and intrastate; that they caused the Souhern Passenger Associaion to file an application with the Commission seeking to increase their interstate fares from 1.65 to 2.2 cents per mile, which resulted in the Order dated August 1, 1942. (R. 928.)

As we understand the authority of the Interstate Commerce Commission to determine rates, etc., such authority is derived from Section 15, paragraph 1, U. S. C. A., Title 49, which provides that the Commission, *after full hearing*, upon a complaint made as provided in Section 13 of the Interstate Commerce Act, or, *after full hearing*, under an order for investigation and hearing made by the Commission on its own initiative may prescribe fares, etc. It appears clear that the Commission undertook to issue an order permitting the railroads herein involved to increase their interstate fares from 1.65 to 2.2 cents per mile, or on that basis, without any hearing whatsoever, and without any evidence being presented to support such an order. We realize that the order recites the following:

> "It further appearing, that on July 14, 1942, the railroads operating in the southern passenger association territory filed a petition in No. 26550, to which no reply or protest has been received, seeking a modification of our findings and outstanding orders therein to the extent necessary to enable such petitioners to

publish and file tariffs increasing their basic coach fare from 1.65 cents (1.5 plus ten percent) to 2.2 cents (2 cents plus ten percent) permile:

"And it further appearing, that a basic coach fare of 2 cents per mile was approved by the Commission for application prior to Ex Parte No. 148 on railroads generally throughout the country, including the lines of said petitioners; that a general increase of 10 percent was authorized to be made in all passenger fares in Ex Parte No. 148, for the reasons set forth in the report therein, supra; and that a basic coach fare of 2.2 cents per mile is now maintained on Class 1 railroads generally throughout the country, with the exception of the aforesaid petitioners:

"It is ordered, that the said petition in No. 26550 be, and it is hereby, denied.

"It is further ordered, that the order of January 21, 1942, in Ex Parte No. 148, be, and it is hereby, further modified so as to authorize the aforesaid petitioners to apply the increase of 10 percent approved in said order to a basic coach fare or 2 cents per mile on the lines of said petitioners, * * * *."

However, we respectfully insist that a "full hearing" is a condition preceding the Commission's

authority to prescribe reasonable rates of fares. No such proceeding was ever held authorizing or prescribing a 2.2 interstate fare for the railroads affected by the Alabama Thirteenth Section proceeding.

DISCUSSION OF RAILROAD COMMISSION OF WISCONSIN V. CHICAGO, BURLINGTON & QUINCY, 257 U. S. 561, AND NEW YORK V. UNITED STATES, 257 U. S. 591.

These two cases, as we understand them, are exactly the same as now presented to this Court, *with one important exception.* The exception being that at the time of the Commission's orders in these cases Congress had enacted a most novel and important feature of the Act (Interstate Commerce Act), which required the Commission to prescribe rates so as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years the return was to be five and one-half per cent, with one-half per cent for improvements, and thereafter to be fixed by the Commission. The Act further provided that the return should be on the basis of the *Commission's* valuation. In both of these cases there was a factual finding that the intrastate fares did not produce their pro rata share of the revenues necessary to permit the carriers to earn the five and

one-half plus one-half per cent for improvements income on the Commission's valuation of the property. It is, therefore, obvious that the lower intrastate fares did actually impose a "burden on interstate commerce." This Court in both cases held that upon evidence almost identical to that offered in the Alabama Thirteenth Section proceeding before the Commission, there was no substantial evidence to support the Commission's finding of discrimination against persons and localities under Section 13 (4) of the Interstate Commerce Act, to justify a state-wide order of the kind here made.

The "fair return" provisions of the Interstate Commerce Act were eliminated by an Act of Congress (45 Stat. 912, 15a and 15b, U. S. C. A., Title 49). Undoubtedly the Commission may consider the matter of a fair return under the protectory provisions guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, insofar as interstate rates are concerned, and the States must also in fixing rates and fares allow a fair return to the railroads under the same constitutional provisions, but the amount of the profit, in excess of a fair return, on intrastate commerce is now left to the States. The Commission may in a Thirteenth Section proceeding order a state-wide increase of intrastate rates or fares when it makes a factual finding that the lower intrastate fares or rates are not contributing their fair share of the revenues required to enable the carriers to render adequate and efficient transportation service, when

such a factual finding is based upon substantial evidence. But the Commission cannot increase an intrastate fare higher than necessary to fullfil this purpose. The evidence is conclusive in this case that the state-made fares are contributing, and, at all times they have been in effect due to any state action, have contributed all of the revenues required to enable the involved railroads to render adequate and efficient transportation service. The difference as we see it is that the State Commissions take the position that this is a wartime crisis and so long as the state-made rates are sufficiently high as to cover all costs of operation, including all taxes (exen excess profits taxes), and in addition thereto provide the carriers with the highest passenger earnings in the past score of years they are sufficient.

REVENUES REQUIRED FROM PASSENGER OPERATIONS TO ENABLE THE RAILROADS TO RENDER ADEQUATE AND EFFICIENT TRANSPORTATION SERVICE.

We have previously stated that it was a matter of public knowledge that freight rates contain a support factor to allow the railroads to enjoy an overall profit despite an accepted passenger operation deficit. We have cited the railroad's witness in support of this (R. 713). Such has been the consistent holding of the Commission in past rate cases. For example, in the "Fifteen Percent Case," 226 I. C. C. 41, the Commission authorizing increases of freight rates up to 10 per cent stated (p. 54):

"This deficit in passenger traffic as a whole has continued from at least 1926 mounting slightly thereafter. *Passenger Fares and Surcharges*, 214 I. C, C. 174, 182. The interrelation of the freight and passenger traffic has often been commented on by us, and we have declined to the proposition again repeated here by certain protestants that we can authorize no increase in freight rates to correct deficiencies in aggregate earnings growing out of the inability of the passenger business to meet its full share of the revenue burden. *Revenue in Western District*, 113 I. C. C. 3, 22-23, *Fifteen* Percent case, 1931, 178 I. C. C. 539, 565; * * * * *"

The Commission in its report attempts to use past passenger deficits as justification for increasing the profitable intrastate fares. Permit us to repeat the testimony of the railroads' witness regarding this:

"Assuming that for five years to come, or six years to come, the present volume and conditions are going to fairly hold. And we must remember this, that passenger deficits did not begin in 1936 when the Interstate Commerce Commission first required them to be reported, but my own knowledge for Southern Railway System Lines is that there was a deficit all the way back to 1921, and (fol. 1621) I think that

condition pretty generally obtained in the Southern Region."

"Examiner Stiles: Hasn't that been considered in making the freight rates, hasn't it been considered in every freight case of any proportions?

"The Witness: Of course that is taken into consideration.

"Examiner Stiles: So that you would not hope to arrive at a passenger revenue that would wipe out the deficit of those past years.

"The Witness: No, I am merely showing the comparison. What we specifically are doing here of course is to seek to make the fares and charges in the several states the same as on interstate business, and get an equal level of passenger fares and rates all over the country. * * *" (R. 713.)

It is fundamental that if passenger operation deficits are supported by freight rates higher than freight costs would justify as reasonable and passenger fares are increased to permit profits sufficient to recoup past deficits the imposition on the public is fallacious. In the first place, there is no deficit to which the railroads can claim that they are entitled. Past deficits in passenger operations

have been paid for by the public in the form of higher freight rates than freight operating costs would justify as reasonable.

We particularly call to the Court's attention that all orders permitting the railroads to increase their fares to the 2.2 cents per mile basis were entered in Ex Parte 148, supra. (Except this Thirteenth Section proceeding.) That the Commission has always considered Ex Parte 148 a war time emergency proceeding, and it is so limited by its own provisions. The Commission being unable to answer the proposition presented regarding the freight rate support factor, dismissed it with the words:

> "If freight traffic is now producing more than a fair return for the above-mentioned or any other reason, it may be dealt with in an appropriate proceeding." (R. 30.)

This appears to impose an impossible task on the public. The evidence clearly presents the conclusion that the higher fares were impractical, and that the railroads suffered a deficit from their passenger operations, even at the reduced fares, so long as private automobiles, and other forms of competition were available to the public. Therefore, the freight rate support factor was necessary to permit the railroads to maintain an adequate transportation system. The only evidence before the Commission as to future expectations is found at page 714 of the Record, "Now, we cannot of course hope for

any era of prosperity long enough to offset past passenger deficits. We expect passengers to fall back into the deficit class just as soon as the war is over. That was the experience following the last war, and I see no reason why it should not follow this war also." Therefore, so far as this record is concerned, the Commission should not attempt to "change its horses in the middle of the stream," change its allocation of support revenues and attempt to force on the public the necesity of attempting to institute rate proceedings in the hundreds of freight rate cases wherein the "passenger support factor" was incorporated, and in addition thereto investigations into all carrier made rates. We are confident that the life of the Ex Parte 148 orders will not continue that long, and we seriously doubt if any stockholder of any railroad stock would live long enough to see the termination of investigations into each and every freight rate now in existence.

We also submit that so long as the railroads are enjoying the benefits of the "passenger support factor" included in various freight rates, the passenger revenues need not even be self supporting for the railroads to enjoy the revenues required to enable them to render adequate and efficient transportation service.

EFFECT OF THE ORDER ON THE NATIONAL STABILIZATION PROGRAM

Section 15a, U. S. C. A., Title 49, provides in part, that:

"The Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; *to the need, in the public interest, of adequate and efficient railway transportation service at the lowest costs consistent with the furnishing of such service;* * * *" (Emphasis supplied.)

We are living today in an era of controlled economy. The butcher, the baker, and the munition maker, all have their profits controlled. It is immaterial whether it be under a system of "price ceilings" or under the "renegotiation of contracts," the ultimate results are the same. It makes little difference whether it is the laborer working under the "little steel formula" or the landlord whose rents are frozen. It may be the "white collar worker" or the wife and child of G. I. Joe. Never before in all history has the need of the public of efficient railway transportation service at the lowest costs consistent with the furnishing of such service been greater. We think that the emphasized provisions above quoted of the Interstate Commerce Act imposes on the Commission the duty to regulate the railroad fares pursuant to the policy of the national stabilization program.

In conclusion, we state that the record in this case shows conclusively that the intrastate fares were highly profitable that the railroads could continue to function as contemplated by the Interstate Commerce Act at the intrastate fare level; that in

no case coming to our knowledge has any utility, during the present wartime emergency, been permitted to increase an admittedly profitable rate thirty-three and one-third percent. We well remember the public repercussion after World War I, arising from wartime profiteering and the "costs plus ten" contracts. If the cost plus ten contracts were considered as wartime profiteering, what can an admittedly profitable fare plus thirty-three and one-third per cent additional profit be considered?

No one disputes that it is the duty of the Interstate Commerce Commission, in its authority to prescribe rates, to allow the railroads revenue sufficient to enable the carriers, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service. However, it is fundamental that if the freight rates include a factor to support past passenger deficits and this factor has been multiplied time and time again by increased volume, this support factor plays entirely too important a part in the "necessary revenues" of the carriers to permit it being ignored in determining the revenues that should be produced by passenger traffic.

This case presents the identical inquiries as presented in the case of *Wisconsin v. C. B. & Q. R. R.*, 257 U. S. 563, in addition to the question of what consideration the Commission should have given the National Stabilization Program, namely:

First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce so as to justify a horizontal increase of them all?

Second. Are the intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?

In both the Wisconsin case and in *New York v. United States*, 257 U. S. 591, this Court held that evidence, almost identical as presented in the case at bar, was insufficient to support a Thirteenth Section order on the grounds of prejudice against persons or localities.

The carriers, it appears, seek uniformity in their fares. In connection with this, in the Wisconsin case, supra, this Court said:

> "If, in view of the changes, made by federal authority in a large class of discriminating state rates, it is necessary from a state point of view to change nondiscriminating state rates to harmonize with them, only the state authorities can produce such harmony. We cannot sustain the sweep of the order in this case on the showing of discrimination against persons or places alone." (at p. 580)

In both the Wisconsin and the New York cases, the railroads were entitled to "costs of operation" plus "a five and one-half per cent return on the value of their properties and a one-half per cent for improvements." The intrastate rates did not produce their pro rata share of this income. Therefore, the revenues of the carriers and interstate commerce were subjected to a burden.

We are most fortunate to be able to present actual results of railway operations when both interstate and intrastate fares were on the basis of 1.65 cents per mile. We respectfully call attention to the transcript of the Alabama Public Service Commission's investigation into the reasonableness of the sought increase, commencing at page 886 of the Record in this case, which discloses the result of the railroads' passenger operations after the impact of wartime conditions, prior to the increase from 1.65 to 2.2 basic increase on interstate commerce. We, therefore, have an accurate picture of the revenues the railroads may expect for the "duration." Using the carriers' own figures, it does not matter whether the revenue is determined before or after income taxes, or for that matter, before or after "excess profits taxes," nor does it matter whether or not the freight rate "passenger support factor" is considered. The evidence in this case conclusively proves that the 1.65 basic fare, on both interstate and intrastate commerce, was producing, and will continue to produce, sufficient revenue to maintain an adequate transportation system. The only question

that remains is whether or not the railroads shall be permitted to take advantage of a wartime crisis to demand unprecedented profits. We think not.

Respectfully submitted,
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FORMAN SMITH,
Assistant Attorney General.

CERTIFICATE OF SERVICE.

I hereby certify that I have served a copy of the foregoing brief and argument on counsel of record by depositing a copy of the same, postage prepaid and properly addressed, in the United States Mail, to each of the following:

Hon. E. A. Smith, Illinois Central System, 135 East 11th Place, Chicago 5, Illinois; Hon. W. L. Grubbs, Louisville & Nashville R. R. Co., Louisville 1, Kentucky; Hon. Y. D. Lott, Jr., Gulf, Mobile & Ohio R. R. Co., Mobile 5, Alabama; Hon. F. W. Gwathmey, 1110 Shoreham Building, Washington 5, D. C.; Hon. Charles Clark, Southern Railway Office Building, 15th and K Streets, N. W., Washington 13, D. C.; Hon. Eli H. Brown, United States Attorney, Washington, D. C.; Hon. Robert L. Pierce, Special Assistant to the Attorney General, Washington, D. C.; Hon. Allen B. Crenshaw, Interstate Commerce Commission, Washington, D. C.; Hon. M. D.

Miller, Federal Office Building, No. 1, Washington, D. C.; Hon. E. D. Mohr, Louisville & Nashville R. R. Co., Louisville, Kentucky; Hon. Leon Jourolmon, Jr., Tennessee Railroad and Public Utilities Commission, Nashville, Tennessee; Hon. Eldon S. Dummit, Attorney General, Frankfort, Kentucky; Hon. M. B. Hollifield, Assistant Attorney General, Frankfort, Kentucky; Hon. J. E. Marks, 411 East High Street, Lexington, Kentucky.

This the 28th day of March, 1945.

WILLIAM N. MCQUEEN,
Acting Attorney General.
OF COUNSEL.

Dated at Montgomery, Ala.,
March 28, 1945.

APPENDIX A

Section 13 (4) of the Interstate Commerce Act, U. S. C. A., Title 49.

"§ 13, par. (4) Duty of commission where State regulations result in discrimination. Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

"15a. Fair return for carriers; disposition of excess; loans and leases to carriers. - * * * *

"(2) Rates to permit carriers to earn fair return. In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe rates for different portions of the country.

"(3) Determination of percentage constituting fair return. The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon; and such percentage shall be uniform for all rate groups or territories which may be designated by the commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation.

"(4) Determination of aggregate value of properties. For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the commission from time to time and as often as may be necessary. The commission may utilize the results of its investigation under section 19a of this chapter, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this chapter the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the commission to be the value thereof for the purpose of determining such aggregate value."

"§ 15. Determination of rates, routes, etc.; routing of trafic; disclosures, etc.—Commission empowered to determine and prescribe rates, classifications, etc.

"(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the

commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not hereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed."

"§ 15a. Fair return for carriers.

"(1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. Feb. 4, 1887, c. 104, Part I, § 15a, as added Feb. 28, 1920, c. 91, § 422, 41 Stat. 488 and amended June 16, 1933, c. 91, Title II, § 205, 48 Stat. 220; Sept. 18, 1940, c. 722, Title I, § 10(e), 54 Stat. 912."